IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA - AD 2020

Civil Appeal No. H1/65/2019

DATE: 3RD DECEMBER, 2020

CORAM: **MARGARET WELBOURNE (Mrs), JA (Presiding)**

MERLEY AFUA WOOD (Mrs), JA

OBENG-MANU JNR, JA

1. GUINNESS GHANA BREWERIES

LIMITED = 1ST DEFENDANT/ APPELLANT

2. VANGUARD ASSURANCE COMPANY

VRS.

SAMUEL LEFONEH = PLAINTIFF/RESPONDENT

JUDGMENT

OBENG-MANU JNR, JA

In this appeal, we are being called upon to determine the propriety or otherwise of the ruling of the learned High Court judge to the effect that the Plaintiff/Respondent's action in the High Court is statute barred.

FACTS

The facts of the case are that, the Plaintiff/Respondent (herein to be referred to as Respondent) was employed as Technical Manager of the 1st Defendant/Appellant Company (hereinafter referred to as the Appellant). The 2nd Defendant who did not file any appeal is Vanguard Assurance Company Limited, (herein to be referred to as the 2nd Defendant). On 17th February, 2002, while engaged in official duties in the course of his employment, the Respondent was involved in a motor accident while travelling on the Accra-Kumasi road. The car in which he was travelling somersaulted several times. In the process, the Respondent sustained severe injuries including multiple body contusions, fracture of right clavicle, injuries to his cervical spine, vertebrae and spondylosis. Respondent after initial treatment at the Brewery Clinic, Kumasi, was thereafter referred to Komfo Anokye Teaching Hospital. He received further treatment at the Specialist Clinic at Ahodwo, Kumasi.

Prior to the accident, the 1st Defendant/Appellant, entered into an agreement with 2nd Defendant under which the 2nd Defendant undertook to provide group personal injury insurance for staff of the Appellant, including the Respondent, for injuries akin to those suffered by the Respondent.

In 2004, after the Respondent had undergone treatment for some time, he commenced the process of making an insurance claim through Appellant with the 2nd Defendant as insurance providers and furnished both the Appellant and the 2nd Defendant with all documents necessary for the payment of the claim.

On 29th July, 2005, the Appellant's Insurance Brokers, Danniads Limited, wrote to the Appellant to inform them of an offer from the 2nd Defendants to make payments to the Respondent for his injuries. The said letter can be found at page 64 of the Record of Appeal (ROA) marked as Exhibit C and same was attached to the written submission ordered to be filed by both sides by the Judge of the High Court. The Submissions were on the preliminary point raised by the Appellant to the effect that the Respondent's claim is statute barred. I hereby reproduce the letter in full below:

EXHIBIT "C"

64

DANNIADS LIMITED

INSURANCE BROKERS & CONSULTANTS

Office Location: [illegible]

Postal Address: [illegible]

DBL/GPA1100/C2254/2005

29th July, 2005

This is the document referred to the Oaths of S. Lefoneh sworn at Accra this 6th day of October 2005 and marked "C" before me.

Commissioner for Oaths

The Managing Director,
Guinness Ghana Breweries Ltd.,
P. O. Box 1636,
Kumasi.

Dear Sir, 'COPY'

RE: **SETTLEMENT OF PERMANENT DISABLEMENT CLAIM UNDER YOUR STAFF/EMPLOYEES' GROUP PERSONAL ACCIDENT INSURANCE POLICY NO. VAGP/92/30122 ON 17/02/2002 – SAMUEL LEFONEH (INJURED EMPLOYEE)**

With reference to the above, your insurers (Vanguard Assurance Company Limited) have informed us that their investigations have disclosed that your above-named Injured Employee was, at the time of the accident, on an Annual Salary of **¢47,000,746.56**.

Your insurers have therefore offered you **¢56,404,495.87** arrived at as hereunder in the above-connection:-

¢47,000,746.56 (Annual Salary) x 3 (years) x 40% (Permanent Incapacity)

= ¢56,404,495.87

We attach herewith their Receipt/Discharge Notes for your execution and return to us for our further action on the claim.

Meanwhile, our usual best and prompt services are assured at all times.

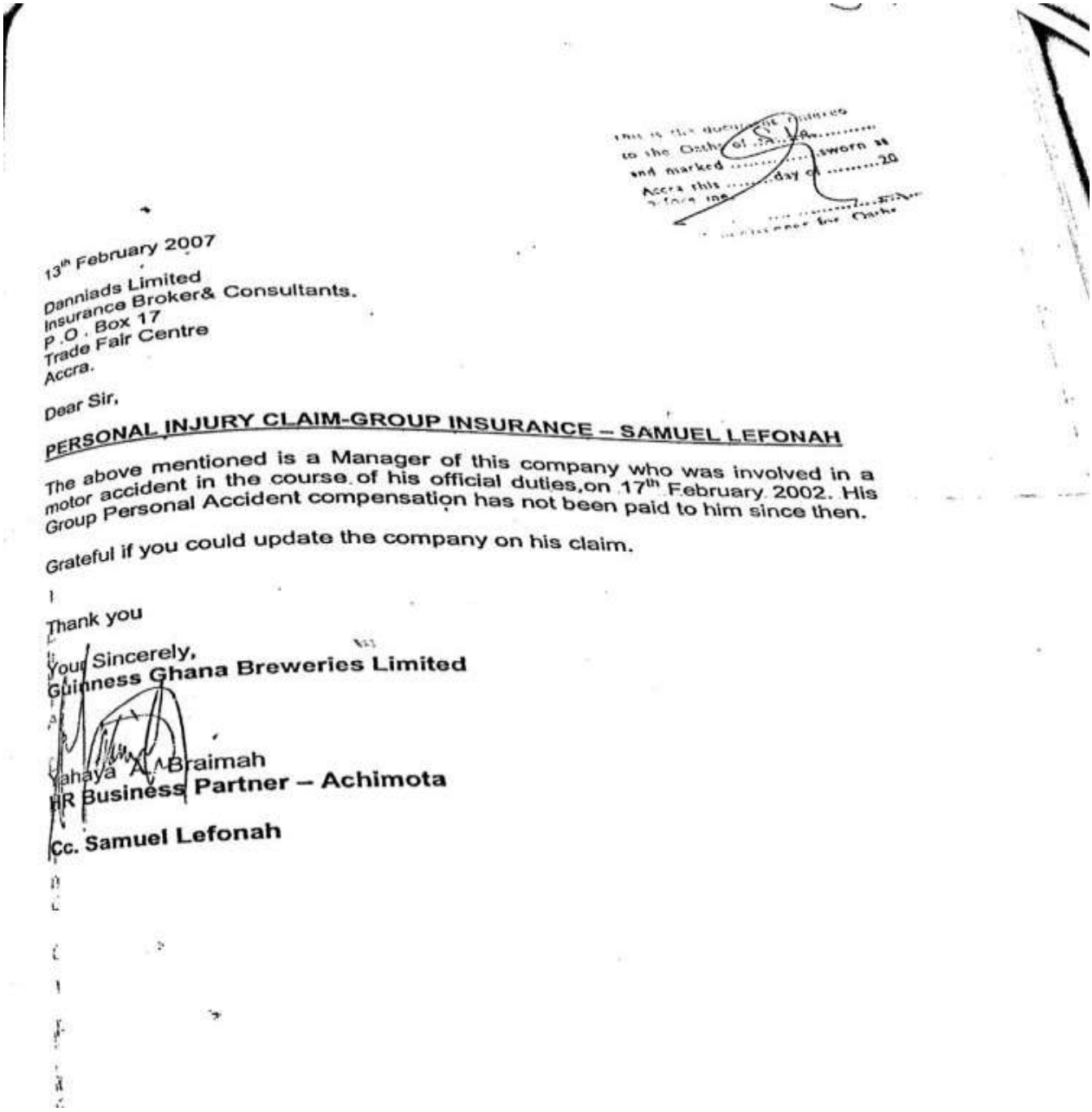
Yours faithfully,
DANNIADS LIMITED

DANNY O. ADJEI
(Managing Director)

Encs.

Attached to this offer letter were discharge vouchers which the Respondent duly completed and submitted to the 2nd Defendant. The Respondent's cheque was prepared by the 2nd Defendant. However, when Respondent appeared at the office of the 2nd Defendant to collect his cheque, the 2nd Defendant withheld the cheque and refused to give it to the Respondent. The reason assigned by the 2nd Defendant for their refusal to hand over the cheque to Respondent was that the Appellant had failed to pay premiums on the group policy.

In addition to this unequivocal written acknowledgement of the Respondent's claim clearly contained in the letter quoted above, the Record of Appeal is replete with negotiations between the Respondent and the Appellant for settlement of the claim. For Instance, at page 39 of the record, there is a letter written by Yahaya A. Braimah, HR Business Partner – Achimota for and on behalf of the Appellant Company to the Brokers, Danniads Limited. This was almost two years after the 2nd Defendant, the principals of Danniads Limited had withheld the cheque meant for the settlement of Respondent's claim. This letter can be found at page 39 of the ROA. It was attached to the Respondent's written submission filed pursuant to the order of the court below to resolve the issue as to whether or not the Respondent's action is statute barred.



13th February 2007

Danniads Limited
Insurance Broker& Consultants.
P .O . Box 17
Trade Fair Centre
Accra.

Dear Sir,

PERSONAL INJURY CLAIM-GROUP INSURANCE – SAMUEL LEFONAH

The above mentioned is a Manager of this company who was involved in a motor accident in the course of his official duties,on 17th February 2002. His Group Personal Accident compensation has not been paid to him since then.

Grateful if you could update the company on his claim.

Thank you

Yours Sincerely,
Guinness Ghana Breweries Limited

Yahaya A. Braimah
HR Business Partner – Achimota

Cc. Samuel Lefonah

Several email correspondences were exchanged between officials in the Finance and HR Departments of the Appellant Company. Examples can be found at page 42, 43 and 46 of the Record of Appeal. The Plaintiff finally retired from the employment of the Appellant.

Appellant and the 2nd Defendant started disputing between themselves as to who was liable to pay the Respondent's claim on account of the claim of 2nd Defendant that the Appellant had defaulted in payment of premiums to the 2nd Defendant. This assertion was denied by the Appellant. This issue has still not been resolved till date.

In their statement of defence, the Appellant asserted that the Respondent's action is statute barred. The Appellant however admitted in their statement of defence in paragraphs 7 and 8 as follows;

"7. 1st Defendant admits paragraph 7 and says that it engaged Danniads limited as its insurance brokers who engaged the 2nd Defendants as insurers for 1st Defendant to settle claims that were brought against the 1st Defendant including the claim that was brought by the Plaintiff.

8. 1st Defendant admits paragraph 8 and says that Plaintiff's insurance claim was directed at the 2nd Defendant who had an obligation to pay the claim brought by the Plaintiff having been paid insurance premiums covering the period within which the Plaintiff accident occurred"

By paragraph 10 of the statement of defence, the Appellant had this to say;

"1o. 1st Defendant denies paragraph 10 and says that in keeping with its obligations as an employer, on or about 21st December, 2004 it paid an amount of Twenty-Nine Million Nine Hundred and Fifty-Eight Thousand Four Hundred and Four Cedis (¢29,958,464) to the Plaintiff as settlement of the Plaintiff's claim under the Workmen's Compensation Law."

The Respondent in his reply to 1st defendant's statement of defence denied having received any alleged payment of ¢29,000,000 from the Appellant and put the Appellant to strict proof of the said averment.

The 2nd Defendant also filed a terse statement of defence in which they alleged in paragraphs 5 and 6 as follows;

"5 The 2nd Defendant admits paragraph 7 except to say that 1st Defendant failed to effect the renewal of the said Insurance Policy by not making payment of the requisite premium.

6 The 2nd Defendant say (sic) that there was no effective Insurance Policy in place between the 1st Defendant and 2nd Defendant at the time of the said accident as 1st Defendant failed to make premium payment to effect the renewal of the policy."

The learned judge in the court below after considering the submissions filed by both sides ruled on 9th July, 2018 that she found that the Respondent's action was not statute barred. She accordingly ordered that the action should proceed.

NOTICE OF APPEAL

The Appellant being aggrieved and dissatisfied with the Ruling of the learned judge in the court below lodged the present appeal against the said ruling on 26th July, 2018 upon the following grounds;

a. ***The trial judge erred when she held that the Plaintiff's action is not statute barred.***
b. ***The ruling by the trial judge is not supported by the Affidavit evidence before the court.***

The relief sought by the Appellant is for the decision of the High Court Accra to be reversed and the Plaintiff's action be dismissed.

Being an interlocutory decision, the Appellant had 21 days within which to appeal. The Appeal was filed 17 days after the ruling was delivered by the High Court and is therefore perfectly within time.

ARGUMENTS OF COUNSEL

(a) The trial judge erred when she held that the Plaintiff's action is not statute barred.

In arguing ground (a) of the grounds of Appeal, Counsel for the Appellant urged this Court to give effect to the provision of Section 3 (1) of the Limitation Act 1972, (NRCD 54).

Section 3 (1) of the Limitation Act 1972, (NRCD54) provides as follows:

"A person shall not bring an action claiming damages for negligence, nuisance or breach of duty irrespective of how the duty exists, where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to a person after the expiration of three years from the date on which the cause of action accrued".

It is the argument of Counsel for the Appellant that it is the plaint of the Respondent that he got involved in a motor accident on 17th February, 2002 and that an offer of payment was purportedly made per letter dated 29th July, 2005 by the Appellant's insurance brokers, which offer failed to materialize due to the conduct of the Appellant and the 2nd Defendant. The Appellant further argued that this means that as at 29th July, 2005 the Respondent's cause of action had accrued assuming that the averments of the Respondent are correct. The Appellant further argued that in this connection, the Respondent cannot sue out of the period limited by statute. The effects of the Respondents' tardiness in bringing the present claim is that at the time of instituting the present suit on 24th March, 2016, the statutory period of three years had long elapsed and the Respondent is barred from bringing the present action to Court. In support of this argument the Respondent quoted from **S Kwami Tetteh's book Civil Procedure, a Practical Approach at page 308,** where there is a passage on striking out of actions of grounds of limitation as follows

*"**Riches vrs Director of Public Prosecutions [1972] 2 All ER 935**. The English Court of Appeal held that a statute barred claim would be struck out as frivolous, vexatious and an abuse to the process of the Court even before the defendant-applicant had filed a statement of defence, so long as the defendant-applicant had evinced an intention to raise the defence of limitation".*

The Appellant also quoted the case of **Dede & Ors vrs Tetteh & Ors [1976] 1GLR 49-54,** where the Court held that

"it is pertinent to say that statutes of limitation are intended to keep a tardy plaintiff out of court and thus free the defendant from being harassed by stale claims, the maxim being ***vigilantibus et non domilentibus*** *(i.e the laws give help to those who are watchful and not to those who go to sleep: and that on the principle of* ***interest republicae ut sit finis litum*** *(i.e. it concerns the state that law suits should not be protracted): fixed periods of time within which actions must be bought or proceedings taken are prescribed in various statutes of limitation, e.g. (a) against public authorities: one year, (b) to recover a penalty or forfeiture not being a fine for a criminal offence: two years, (c) for personal injuries: three years…. but in order that advantage may be taken of a statute of limitation, an issue thereon must be raised by the pleadings".*

Counsel for the Appellant made a very important concession when at page 5 of his written submission he stated as follows:

"*my lords, it is only an acknowledgement in writing that can cause a fresh accrual under the Act* and suffice to say that the action brought by the Respondent being one founded in the claim for damages for personal injuries is not even a right of action that can be accrued of the date of acknowledgment if any as envisaged under Section 17 of the Limitation Act…". (the emphasis is mine).

He rounded up his arguments that even under the inherent jurisdiction of the trial court, the present action could have been struck out as being statute barred under the Limitation Act, 1974, (NRCD 54), so that no further expense is incurred in ligating a suit that is still born, and that the learned trial Judge erred when she held that the Plaintiff's action is not statute barred.

DETERMINATION OF THE APPEAL

On this first ground of Appeal namely:

The trial judge erred when she held that the Plaintiff's action is not statute barred.

It is provided by Section 3 of the Limitation Act, 1972 NRCD 54 as follows;

"1 A person shall not bring an action claiming damages for negligence, nuisance or breach of duty irrespective of how the duty exists, where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to a person, after the expiration of three years from the date on which the cause of action accrued."

In the Supreme Court case of ***DOLPHYNE (NO.3) V. SPEEDLINE STEVEDOORING CO. LTD. (1996-97) SCGLR 514***

Holding (2) *"The Limitation Decree 1972 (NRCD 54), was essentially a special plea which must be pleaded as required by the High Court Rules, LN140 A. If not pleaded, it could not be adverted to in submission to. The court would not of its own motion take notice that an action was out of time".*

The Appellant herein duly pleaded the Statute of Limitation and therefore that defence avails it.

Please see also the Supreme Court case of ***ARMAH V. HYDRAFOAM ESTATE (GH.) LTD. [2013-2014] 2SCGLR 1551***

Holding 5: *"Thus matters like laches, acquiescence and limitation are all to be pleaded since the party who is entitled to rely on them may decide not do so; the other party should not be taken by surprise and is therefore entitled to notice in the pleadings in order to raise any answer he may have to these claims***."** ***– Per Benin JSC***

In this case, the accident occurred on 17th February, 2002. The Respondent commenced the process of making insurance claim in 2004. It was not until 24th March, 2016, that he commenced the instant action against both Defendants in the High Court.

It has been held in the case of **EMELIA HOLMES VRS DR. NII ARMAH JOSIAH ARYEE (Unreported decision of the High Court Suit No. AC254/2009)** dated 2nd April, 2012 per **Justice Uuter Paul Dery** that

"the instant case shows that a clear distinction should always be drawn between acknowledgement of a cause of action and acknowledgement of indebtedness. An acknowledgement of indebtedness does not necessarily mean that a cause of action has arisen. However, an acknowledgement of a cause of action means that, there is in existence, a cause of action which a person acknowledges in writing making it a fresh accrual of the cause of action which is the one contemplated by Section 17 of NRCD 54"

Therefore, in this case, written acknowledgements by the Defendants of the indebtedness to the Respondents began on 29th July, 2005 and continued to 2008. Clearly, therefore, as further explained in the Emelia Holmes case

"*…in such a case the cause of action accrues not on the date the money is given to the borrower but on the date agreed by the parties that the money be refunded whether with or without interest. It is when the borrower defaults in refunding the money on the agreed date to the to the lender that the cause of action for the refund of the money accrues or arises. In other words, time would only begin to run from the expected date of refund of the money borrowed."*

The Respondent signed the discharge vouchers sent to him by Danniads as agent of both Defendants in July, 2005. However, through no fault of his, the 2nd Defendant withheld the cheque. To date, the cheque has still not been paid to him. The Appellant had also been pursuing the claim for and on behalf of the Respondent. It does appear that somewhere along the line, the Appellant stopped pursuing the claim on behalf of the Respondent. The Appellant now turns around to claim that it has paid Workmen's Compensation to the Respondent which claim is stoutly denied by the Respondent. The Appellant finally seeks refuge in the statute of limitation, alleging that the Respondent's action is statute barred.

In the case of **FIAGA v. GHANA COCOA BOARD [1992] 2 GLR 393-396, F. M. LARTEY, J (as he then was)**

held, upholding the preliminary objection that:

"where parties embarked on negotiations and eventually agreed on the issue of liability, a defendant, when sued out of time, could not plead a statute of limitation as a bar to the action. Where, however, there had not been an agreement, as in the present case; where no evidence to the effect that the defendants had accepted liability was tendered, the plaintiff could not be heard to say that he was negotiating with the defendant and accordingly should be allowed to commence his action outside the limitation period. Wright v. Bagnall (John) & Sons Ltd. [1900] 2 Q.B. 240, C.A.; Lubovsky v. Snelling [1944] K.B. 44, C.A. and Arcton v. Accra-Tema City Council [1977] 2 G.L.R. 43 distinguished."

In this case, the evidence about that negotiations indicates that an amount was agreed upon, there was a written acknowledgement of the amount agreed upon in full settlement and satisfaction of Respondents claim. The Respondent executed the attached discharge vouchers and forwarded them to the 2nd Defendant. The 2nd Defendant prepared the cheque to effect payment to the Respondent. However, the 2nd Defendant withheld the cheque for the reason that they had discovered that the Appellant had not been paying the premiums. In this connection, it would be unconscionable for the Appellant who until 2008 was still pursuing the cheque in settlement of the claim from the 2nd Defendant for and on behalf of the Respondent to turn around to use the statute of limitation as a shield. Ground A is therefore without merit and the same is accordingly dismissed.

GROUND B OF THE GROUNDS OF APPEAL

The ruling by the trial judge is not supported by the Affidavit evidence before the court

The Appellant argued that the evidence adduced by the Respondent in his written submission filed on 6th June, 2018 and which can be found at pages 25 – 31 of the Record of Appeal (ROA) to the effect that the Respondent's tardiness in bringing the

instant suit was occasioned by the Appellant's action or omissions and therefore that the reckoning of time must begin to run from when the Appellant either by express communication or conduct showed that they will not pay the Respondent's his entitlement and not from the time that the accident occurred.

The Appellant discounted the Respondent's further arguments that even though he had not specifically pleaded fraud, the facts pleaded in his statement of claim and affidavit clearly show that the Appellant and the 2nd Defendant perpetrated fraud against the Respondent. The Appellant rehashed the cases cited by the Respondent in his written submission namely the cases of **Amuzu vrs Oklikah [1997 – 1998] 1GLR and Okofoh Estate Limited vrs Modern Signs Limited [1996 – 1997] SCGLR 233 at 255** as well as Section 22 of the Limitation Act, 1972 (NRCD 54) in a bid to extend the period limited by statute.

The Appellant argued that the Respondent's plea of fraud in his written submission cannot avail him because the allegation of fraud was never pleaded in his statement of claim. Appellant argued that the **Amuzu vrs Oklikah** principle does not apply to this case, and further that the facts before the court clearly did not lead to fraud but rather to a Plaintiff who has been tardy. The Appellant cited the case of **Mass Projects Limited (No. 2) vrs Standard Chartered Bank & Yoo Mart Limited (No. 2) [2013 – 2014] SCGLR 309 at 320,** whereat the Supreme Court held that:

"High sounding phrases and allegations of fraud, forgery and illegality etc remain mere allegations on paper if they have not been proven in law…". The Appellant also cited the case of **Re: Agyekum (Deceased), Agyekum & Ors vrs Tackie & Brown (substituted by Adjindah & Ors [2005 – 2006] SCGLR 851 at page 855**, whereat the Supreme Court held that:

"Where fraud is alleged, it is a different matter; for fraud vitiates every act or deed put up forward as supporting a transaction or even a Judgment of a court. But where fraud is alleged (and we may include duress and undue influence) they must be pleaded with the requisite particularity. Vague allegations of uncommon, when usual or even unconscionable

dispositions of his own property by a testator, induced by logic rather than facts properly pleaded should be firmly ignored..).

The Appellant argued that the Respondent sought to support his allegations of fraud with an affidavit filed on 6th June, 2018 with annexures marked as Exhibits B1 series, Exhibits B2, Exhibits B3, B4, B5, B6, B7, B8, B9, B10, B11, B12, B13 and C found on pages 32 – 64 of the record as evidence of discussions and interactions Respondent held with Appellant until 2013. *The Appellants continued to argue that the Respondent in proving the averments that the Appellant had perpetrated fraud against him thereby contributing to the tardiness of the Respondent in bringing the present action, the Respondent was required to adduce sufficient evidence to prove the belief that the Appellant had perpetrated fraud against him or that he was in communication or negotiation until 2013. However, according to the Appellant the evidence placed before the court was without any shred of credibility.* (the emphasis is mine).

It is not for the Appellant to determine whether or not the evidence placed before the Court is credible or not. That is the duty of the learned trial Judge. And that duty will be discharged by the learned trial Judge at the end of trial. The nature of the evidence placed before the Court and the various contentions of the two Defendants namely: the Appellant herein and the 2nd Defendant are such that the trial Court needs to hear evidence and cross examination of the witnesses before arriving at a safe conclusion in this matter.

The affidavit evidence contained in Exhibit C and the letter written by Yahaya Braimah which can be found at page 39 as well as several e-mail correspondence exchanged between Officers of Guinness Ghana Breweries Limited which are produced above at pages 42, 43 and 46 bear ample testimony to the fact that there was a written acknowledgement of indebtedness based on negotiations in the process of the Respondent's claim. The Ruling the learned judge in the court below cannot therefore be faulted. There is therefore no merit in ground B of the grounds of appeal and the same is accordingly dismissed.

CONCLUSION

On the whole, we find no merit in the Appeal. The Appellant's appeal is accordingly dismissed in its entirety. The Ruling of the learned High Court judge is hereby affirmed. The suit is remitted to the High Court for its trial to proceed. We award costs of GH¢10,000.00 in favour of the Respondent.

SGD

……..

OBENG-MANU JNR

(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE **…….**

MARGARET WELBOURNE (Mrs.)

(JUSTICE OF THE COURT OF APPEAL)

SGD

I ALSO AGREE **…….**

MERLEY AFUA WOOD (Mrs.)

(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

INGRID SERWAA ASARE FOR APPELLANT

JUSTICE AYISI FOR PLAINTIFF/RESPONDENT